UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

GERRIT H.J. MUSTERD, Plaintiff,	:	
v.	:	C.A. No. 17-124JJM
RHODE ISLAND DEPARTMENT OF HEALTH, Defendant.	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

This matter is before the Court on Defendants'[1] second motion to dismiss (ECF No. 40) Plaintiff's complaint. ECF No. 38. Plaintiff, a *pro se* litigant, is an inmate at the Rhode Island Adult Correctional Institutions ("ACI"), where he is serving two life sentences and a ten-year sentence (all consecutive) for carrying out a murder for hire in 2009. Plaintiff's original complaint (ECF No. 1) was based on his acceptance of a proffered chicken pox vaccine at the ACI in 2016; he claims he relied on inaccurate information provided by DOH employees about the vaccine's ingredients, causing him to ingest matter that is haram[2] for him as an adherent to the tenets of Islam. Based on a report and recommendation ("R+R") issued on August 29, 2017 (ECF No. 24),[3] the Court granted Defendants' first motion to dismiss (ECF No. 13) and provided Plaintiff with thirty days to amend. Text Order of Nov. 16, 2017.

[1] Defendants are the Rhode Island Department of Health ("DOH"), its director, Nicole Alexander-Scott, M.D., and DOH employee Alysia Mihalakos; the individuals are sued in their individual and official capacities (collectively "Defendants").

[2] Merriam-Webster Dictionary defines haram as "forbidden by Islamic law."

[3] The reader's familiarity with the R+R is assumed. Its contents are incorporated in this report and recommendation and will not be repeated except for intermittent references to explain the background and analysis.

After filing numerous letters and motions seeking more time based principally on his struggle to get access to copies of relevant cases because the ACI law library is out of date (ECF Nos. 29, 32, 33, 34, 35, 36), Plaintiff filed his "Attempt for an Amended Complaint." This pleading, which the Court has treated (and I refer to) as his "amended complaint," states his intent to add claims based on the alleged negligence of a DOH employee, motivated, Plaintiff claims, by Islamophobia, in providing inaccurate information in response to questions posed by prisoners at an information session about the vaccine. ECF No. 38. After the Court accepted this filing as the amended complaint (ECF No. 38), Defendants followed with a renewed motion to dismiss. ECF No. 40.

The amended complaint still fails to make any claim of constitutional dimensions or to state a viable claim under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). Moreover, focusing on Plaintiff's new claim of negligence, this Court lacks subject matter jurisdiction over such a claim, which is based on state, not federal, law, both (1) because it names a state agency and its officials (acting in their official capacity), which not only defeats diversity jurisdiction pursuant to 28 U.S.C. § 1332(a), but also is prohibited by the Eleventh Amendment; and (2) because, even if the State and its officials (acting in their official capacity) were dismissed, there is an insufficient amount in controversy for the Court to have diversity jurisdiction pursuant to 28 U.S.C. § 1332(a). For these reasons, I recommend that Defendants' motion to dismiss be granted. Nevertheless, mindful of Plaintiff's frustration with the ACI law library, I also direct Defendants' counsel to take steps to ensure that Plaintiff has access to relevant cases well before his objection to this report and recommendation is due.

I. Background[4]

[4] In recognition of the leniency required for a *pro se* pleading and because Plaintiff's amended complaint incorporates his original complaint by reference, these facts are based on the allegations in both complaints, as well

Plaintiff alleges that he is a "Sunni/Orthodox" Muslim, who understands the strictures of his religion to forbid the ingestion of certain "animal-by-products/enzymes." ECF No. 1 at 5, 16. Following an outbreak of chicken pox at the ACI, two DOH employees visited the prison on May 30, 2016, to educate inmates about the vaccine. Id. at 5. During a group session, Plaintiff asked whether the vaccine contained animal by-products; contrary to information DOH had posted on its website, he was assured that the vaccine was egg-based. Id. at 13-14. Based on this inaccurate information, on June 2, Plaintiff opted, along with many (but not all) other inmates, to receive the vaccine; several other Muslim prisoners declined. Id. at 5. Subsequently, Plaintiff learned from his nephew, who had reviewed the DOH website, that the vaccine contained "Gelatin and Fetal Bovine Serum," which his religion forbids him to "put in his body." Id. at 5, 15. Based on these facts, the original complaint claimed violations of Plaintiff's rights under the First Amendment, the Eighth Amendment and the Religious Freedom Restoration Act, 43 U.S.C. § 2000bb-1.[5] He requested compensatory damages of $100,000 and punitive damages of $100,000. Id. at 3, 18.

In response to Defendants' first motion to dismiss, the Court reviewed Plaintiff's complaint with the liberality required for a *pro se* plaintiff,[6] acknowledged the seriousness of Plaintiff's religious scruples, but held that what appears to be a troublingly negligent statement made by one DOH employee neither gives rise to viable constitutional claims under § 1983 nor

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as in Plaintiff's passionate opposition to the motion to dismiss (ECF No. 41), which points out the catastrophic health effects potentially caused by DOH's negligence in providing inaccurate information at a group meeting regarding the ingredients of a vaccine. Because the Court is considering a motion to dismiss, all of Plaintiff's plausible facts are accepted as true. Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996).

[5] Because the Religious Freedom Restoration Act, 43 U.S.C. § 2000bb-1 has been held unconstitutional, the Court has reviewed Plaintiff's religious claims under RLUIPA. R+R at 1 n.1.

[6] Erickson v. Pardus, 551 U.S. 89, 94 (2007) ("a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers").

does it trigger a claim under RLUIPA. R+R at 7-11. The R+R was adopted by the District Court by text order dated November 16, 2017, but afforded Plaintiff leave to amend.

After several extensions, Plaintiff indicated by a timely letter to the Court that he wanted to amend his complaint. ECF No. 37. The letter was docketed as his amended complaint. ECF No. 38. In this amended complaint, Plaintiff explains that the "situation . . . is already known to this court." ECF No. 38 at 1. He states that he would like to add a negligence claim "on behalf of the employees of the R.I. Dept. of Health," whose conduct he alleges was deliberate and caused by "Islamophobia," although he provides no facts to support the claim. Id. at 1-2. He reiterates his lament that he has no access to case law because the ACI law library's collection is limited and because he is required to pay for copies of more recent cases. Id. at 2.

II. Standard of Review

Defendants move to dismiss Plaintiff's amended complaint pursuant to Fed. R. Civ. P 12(b)(6) for failure to state a claim upon which relief may be granted. In considering such a motion, the court must accept as true all allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996). The United States Supreme Court has stated the standard as follows: "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 563 (2007). After Twombly, the Supreme Court further refined its requirements in Ashcroft v. Iqbal:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.

556 U.S. 662, 678 (2009) (internal citations and quotations omitted). Because Plaintiff is representing himself, and is confronting obstacles posed by his incarceration, it is proper for the Court to review his claims with the utmost leniency. Erickson, 551 U.S. at 94.

III. Analysis

Defendants' renewed motion to dismiss (ECF No. 40) argues that Plaintiff's amended complaint, which they analyze in isolation from his other filings, "does not assist in ascertaining what claim or claims are being alleged against" any of the Defendants, in violation of Fed. R. Civ. P. Rules 8, 10 and 12. While Defendants are right that the amended complaint, little more than a letter stating the intent to add a claim of intentional negligence[7] based on Islamophobia, does not come close to the standard set by these Rules, Plaintiff's *pro se* status requires the Court to look past that deficit. Based on Plaintiff's statement that he wants to add claims for negligence animated by Islamophobia "about the situation that is already known to this court," ECF No. 38 at 1, the Court has treated the factual background of the original complaint as incorporated into the amended pleading.

Nevertheless, Defendants' argument hits the mark, at least as to the federal law claims. The absence of any specific factual allegations to support a § 1983 cause of action against the individual Defendants (Alexander-Scott and Mihalakos) is fatal as to claims against them in their individual capacities.[8] Fed. R. Civ. P. 12(b)(6); Iqbal, 556 U.S. at 682-83. Further, Plaintiff

[7] While Plaintiff uses the term "negligence," this state law claim may be better interpreted as a claim for intentional misrepresentation. However, such an interpretation does not advance Plaintiff's cause. Under Twombly/Iqbal, such a claim would fail in federal court because Plaintiff has not included any facts to render plausible a claim of intentional (as opposed to negligent) misrepresentation. Under Rhode Island law, a claim of intentional misrepresentation requires plausible factual allegations that the defendant intended to deceive the plaintiff. Stebbins v. Wells, 766 A.2d 369, 372 (R.I. 2001).

[8] Plaintiff does name "Jane Doe" and "John Doe" as unnamed and unknown DOH employees who came to the ACI and alleges that the unknown male employee mischaracterized the vaccine's ingredients. ECF No. 1 at 2, 13-14. There is no suggestion that either of these unknowns is the same person as either Alexander-Scott or Mihalakos, both of whom are identified as senior DOH officials. ECF No. 1 at 3.

continues exclusively to seek money damages. RLUIPA does not provide for monetary damages against state officials acting in their individual capacities or against a state agency or state officials acting in their official capacities because such claims are barred by sovereign immunity. Sossamon v. Texas, 563 U.S. 277, 282 (2011); Cryer v. Spencer, 934 F. Supp. 2d 323, 333 (D. Mass. 2013). Nor does a § 1983 money damages claim lie against a state agency or against state officials acting in their official capacities. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989). Therefore, Plaintiff's individual capacity RLUIPA claims fail, as do Plaintiff's § 1983 and RLUIPA claims against DOH and Alexander-Scott and Mihalakos in their official capacities. Accordingly, the federal claims in the amended complaint are subject to dismissal.

In addition to these deficits, the substantive flaws that still sink Plaintiff's federal claims are those previously addressed in the R+R. Though unfortunate and clearly offensive to Plaintiff, the conduct about which he complains simply does not rise to the level of a constitutional violation or an actionable instance of religious discrimination under RLIUPA or any other federal statute. As the Court explained in the R+R, a Muslim inmate's single exposure to an animal product as a result of a state employee's mistake or negligence is neither a constitutional nor a RLUIPA violation. R+R at 8-10 (citing Johnson v. Varano, No. 714 C.D. 2010, 2011 WL 10843816, *1 (Pa. Commw. Ct. Mar. 9, 2011) ("an isolated incident whereby Plaintiff was exposed inadvertently to pork at one meal does not raise a question of constitutional proportion")); see Hosey-Bey v. Williams, No. 2:12-cv-959-WHA, 2015 WL 4988388, *5-6 n.4 (M.D. Ala. Aug. 19, 2015) (rejecting constitutional and RLUIPA claims; "single incident insufficient to rise to the level of a substantial burden on Plaintiff's exercise of religion"). Further, the amended complaint remains devoid of plausible facts permitting the unlikely inference that one DOH employee's failure accurately to answer a question posed at the ACI

group session, despite the availability of accurate information posted on the agency's website, was intentional conduct animated by Islamophobia.

The remaining question is whether, pursuant to 28 U.S.C. § 1332(a)(2),[9] this Court may exercise subject matter jurisdiction over Plaintiff's state law negligence/misrepresentation claim based on the variant of diversity jurisdiction, commonly referred to as "alienage" jurisdiction. Diversity jurisdiction based on alienage should be considered because the suit is between Plaintiff, a citizen of the Netherlands (ECF No. 1 at 4),[10] and DOH, together with its employees, both of whom appear to be citizens of Rhode Island. Although Plaintiff did not plead the existence of alienage jurisdiction[11] and, understandably, Defendants did not address it in their motion to dismiss, the Court's obligation of leniency requires that this possibility that the state claims might survive should be carefully evaluated. See Harbi v. Mass. Inst. of Tech., C.A. No. 16-12394-FDS, 2017 WL 3841483, at *5 (D. Mass. Sept. 1, 2017) (if federal law claims

[9] Section 1332(a)(2) provides:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
> . . .
> (2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State.

[10] While alienage jurisdiction fails for the reasons stated in the text, it may also fail because Plaintiff may fall into the exception to alienage jurisdiction, which applies to a suit between "citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State." 28 U.S.C. § 1332(a)(2). As a prisoner who was living in Rhode Island before he was incarcerated, Plaintiff is deemed to be domiciled in Rhode Island. Luna v. Estate of Irigoyen, No. 1:14-cv-00955 LJO GSA, 2014 WL 4344804, at *2 (E.D. Cal. Aug. 29, 2014). Nor is it clear that a prisoner serving two life sentences would not be deemed to be "lawfully admitted for permanent residence in the United States." 28 U.S.C. § 1332(a)(2). If Plaintiff does fall into the exception, the Court lacks alienage jurisdiction under § 1332(a)(2).

[11] However, Plaintiff did fill in the box on the civil cover sheet to be used only for diversity jurisdiction cases, indicating that he is a citizen of a foreign country, while the individual Defendants are citizens of Rhode Island. ECF No. 1-1.

dismissed, court should examine whether there is alienage jurisdiction to consider state-law claims).

The first impediment to alienage jurisdiction is that neither a state nor its agencies is a citizen of itself for purposes of diversity jurisdiction; in any event, the Eleventh Amendment bars federal courts from exercising jurisdiction in cases where a state is sued under state law. New England Multi-Unit Hous. Laundry Ass'n v. Rhode Island Hous. & Mortg. Fin. Corp., 893 F. Supp. 1180, 1187-88 (D.R.I. 1995). Thus, as long as DOH and its officials acting in their official capacities are defendants, Plaintiff's state law claims cannot proceed in this Court, both because diversity is lacking and because such claims are barred by the Eleventh Amendment. Moreover, even if DOH and the official capacity claims against Alexander-Scott and Mihalakos were dismissed, although the Eleventh Amendment does not protect Alexander-Scott and Mihalakos from suit in their individual capacities for employment-related acts, what would remain is not viable because the amended complaint utterly fails to allege any "employment-related acts" allegedly committed by either of them. See Jackson v. Ga. Dep't of Transp., 16 F.3d 1573, 1575 (11th Cir. 1994) (citing Hafer v. Melo, 502 U.S. 21, 28 (1991)).

An equally fatal blow to Plaintiff's ability to invoke alienage jurisdiction is that the pleading must establish at least $75,000 in controversy arising from the state law tort claim, which it fails to do. Plaintiff's damage allegations ($100,000 in compensatory damages and $100,000 in punitive damages) are both based on § 1983. Neither of these damage claims is plausible under Rhode Island tort law. For compensatory damages, Plaintiff's alleged injury – emotional distress but no physical symptoms based on ingesting a substance he believes is prohibited by his religion – will yield at most a nominal award. Marchetti v. Parsons, 638 A.2d 1047, 1052 (R.I. 1994) (to recover compensatory damages for emotional distress, claimant must

show "serious emotional injury that is accompanied by physical symptomatology"). Nor, viewed with the appropriate degree of skepticism, is Plaintiff's claim for punitive damages viable under Rhode Island state law. See Messier v. Ace Am. Ins. Co., C.A. No. 12- 892-JD, 2013 WL 5423716, at *3 (D.R.I. Sept. 26, 2013) ("Where the punitive . . . damages claim makes up the bulk of the asserted amount in controversy, a heightened degree of scrutiny and healthy skepticism is appropriate."). The Rhode Island Supreme Court has set an extremely high bar for recovery of a punitive award in a tort case, consistently holding that the claimant must prove "willful, wanton, or malicious conduct." Castellucci v. Battista, 847 A.2d 243, 248 (R.I. 2004). Plaintiff has failed to allege sufficient facts to clear this hurdle. Accordingly, the amended complaint does not plausibly allege a state law tort claim with damages that could fulfill the federal court's amount-in-controversy requirement. Therefore, even if supported by plausible facts (which the amended complaint does not include), the claims of negligent and intentional misrepresentation asserted against Alexander-Scott and Mihalakos in their individual capacities cannot be sustained based on the Court's alienage jurisdiction.

Based on the foregoing, analyzed from the perspective of the Constitution and RLUIPA, the amended complaint still fails to state a federal law claim. From the perspective of Plaintiff's newly-asserted state law claim, it is clear that the Court lacks diversity-based subject matter jurisdiction over claims of negligence or intentional misrepresentation, as well as that such claims are largely barred by the Eleventh Amendment. With no viable federal claim, no diversity jurisdiction and an Eleventh Amendment bar affecting all but the individual capacity claims and no plausible facts to support the claims that are not barred, this Court should decline to exercise its discretion to retain supplemental jurisdiction over Plaintiff's state law claims. 28 U.S.C. § 1367(c)(3); see United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966) ("if

the federal claims are dismissed before trial, . . . the state claims should be dismissed as well"). Accordingly, the amended complaint, in its entirety, should be dismissed.

A coda: Plaintiff has argued persistently that the ACI's law library is inadequate. This plaint echoes a similar claim made in other cases. To ensure that Plaintiff is appropriately afforded access to a law library to the extent required by Bounds v. Smith, 430 U.S. 817, 828-29 (1977), as cabined by Casey v. Lewis, 518 U.S. 343, 385-86 (1996), the Court hereby directs counsel for Defendants to take steps sufficient to ensure that Plaintiff is provided with access to the cases cited in the R+R and in this report and recommendation, as well as those cited in Defendants' motion to dismiss (ECF No. 40), by March 26, 2018, or sooner if reasonably possible. Access shall be without cost and may be provided either electronically or by providing access to a paper copy or a book. If free access is provided, Plaintiff may request paper copies, for which a reasonable charge may be assessed. If providing a paper copy is the only way to provide access, no charge may be assessed, provided that if Plaintiff opts to retain the paper copy, a charge may be assessed. This Order is incorporated in a Text Order entered today.

IV. Conclusion

Based on the foregoing, I recommend that Defendants' motion to dismiss (ECF No. 40) be granted and that Plaintiff's amended complaint (ECF No. 38) be dismissed without prejudice to being filed in state court.

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to

appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
March 19, 2018